XI-HC-22

(16)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

HIGH COURT OF CHHATTISGARH BILASPUR

CRIMINAL APPEAL NO. 13 of 2003

APPELLANT (In Jail) — Mativas @ Manesh @ Damru Uraon, S/o Lukeshwar Uraon, aged about 19 years, Caste – Uraon, r/o Village Akkadiha Khotro, P.S. Rajpur, Distt. Surguja, C.G.

VERSUS

RESPONDENT — The State of Chhattisgarh, through P.S. Rajpur, Distt. Surguja C.G.

Present:

Mr. A.K. Prasad, counsel for the appellant.

Mrs. Madhunisha Singh, P.L. for the State/respondent.

ORAL JUDGMENT

(1st November 2007)

Dhirendra Mishra, J.

This criminal appeal is directed against the judgment of conviction and order of sentence dated 20.11.2002 passed in S.T. No. 121/02 whereby learned Sessions Judge, Surguja has convicted the appellant under Sections 363, 366, 376 of the Indian Penal Code and sentenced him to undergo RI for 3 years, 4 years, 7 years respectively with fine of Rs.200/- on each count and in default of payment of fine to undergo additional RI for 10 days each.

2. Case of the prosecution, in brief, is that the on 31st December 2001 at about 6.00 p.m. the prosecutrix had gone to pay the labour charges of cycle repairing to the house of

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Sainath. However, she met the accused on way, who was on his bicycle. On being asked by the accused, she sat on his bicycle. Thereafter, the accused took her towards the forest despite her objection under threat and committed rape with her. After committing rape he promised her to marry and thereafter took her to his house, confined her in a room and raped her in the night also. In the next morning the prosecutrix returned to her home and narrated the incident to her family members and it was decided to convene a Panchayat. However, Panchayat could not convened and ultimately a report was lodged on 5.1.2002 vide Ex.P/1. The prosecutrix was sent for medical examination to Community Health Center, Rajpur where Dr. (Smt.) Kiran Bhujagwali examined her and gave her report of Ex.P/14. During investigation she was also sent for X-ray examination for ascertaining her age and report of the radiologist is Ex.P/10 & P/11. For the purposes of ascertaining her age, copy of school admission register (Ex.P/9) was also seized. After completing investigation charge sheet was filed in the Court of Judicial Magistrate First Class, Ambikapur and the same was received by learned Sessions Judge for trial.

3. During trial the prosecution examined 11 witnesses in all. Thereafter, statement of the accused was recorded in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence and false

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implication. However, learned trial Court after hearing counsel for the respective parties, convicted and sentenced the accused/appellant as mentioned in paragraph 1 of this judgment.

4. Learned counsel for the appellant argued that the trial Court has convicted the appellant by assessing age of the prosecutrix below 16 years though from the evidence available on record, the prosecution has failed to prove that the prosecutrix was less than 18 years of age on the date of incident. Referring to the report of radiologist and statement of Dr. M.K. Jain (PW-7) it is argued that the radiologist in his report of Ex.P/11 has assessed the radiological age of the prosecutrix to be 14 years. However, in his statement before the Court he has stated that age of the prosecutrix could not be more than 16 years and in his cross-examination he has further stated that a variation of 1-2 years is possible in his report. Referring to the document of Ex.P/9 i.e. copy of the admission register and the statement of PW-6 Ku. Shanti Lakda, Head Mistress of the school, it is argued that entry in the admission register was made on the basis of transfer certificate of Class-V, however, the transfer certificate has not been produced whereas father of the prosecutrix namely Darji (PW-2) has stated in paragraph 8 of his cross-examination that age of her daughter was recorded by the teacher approximately.

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	5. Relying upon the judgment of the Hon'ble Supreme Court in the matter of **Ravinder Singh Gorkhi Vs. State of U.P.** reported in **2006 AIR SCW 2648,** it is argued that where the original register is not produced to substantiate the date of birth at the time of trial and where the person who had made entries in the said register has not been examined, the entries in the admission register cannot be relied upon. Further referring to the judgment of this Court delivered in the matter of **Mukesh Kumar Vs. State of C.G.** reported in **2007(3) C.G.L.J. 41** it is argued too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development and the possibility of difference of three years in such determination may be there. Therefore, if the age assessed by the radiologist is taken on its face, as per Modi's Medical Jurisprudence the possibility of age of the prosecutrix being more than 18 years is there. Further referring to the statement of the prosecutrix, it is argued that conduct of the prosecutrix is suggestive of the fact that she was a consenting party as from her deposition it is evident that initially she alleges that she was subjected to rape in the forest, which was witnessed by Sarju (PW-3), who is also her uncle and thereafter she proceeded with Sarju up to a distance and	

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when she was going alone with him, accused again took her to his house, confined her for the night and committed rape with her. He further argued that the very pretext given by the prosecutrix to come out of her house for paying the labour charges of cycle repairing is belied by the version of PW-5 Sainath, who has categorically stated that they owe no money as alleged by the prosecutrix.

6. On the other hand, learned counsel for the State has supported the impugned judgment of trial Court and vehemently argued that age of the prosecutrix was below 14 years on the date of incident, which has been established firstly from the school admission register wherein her date of birth has been mentioned as 1.7.1988 and secondly, from the report of Ex.P/11 of the radiologist wherein age of the prosecutrix was shown as 14 years. It is also argued that the appellant forcibly took the prosecutrix on his bicycle, raped her in the forest, which was witnessed by Sarju (PW-3) and thereafter, took her to his house, confined her there for the night and again committed sexual intercourse with her against her will and as such, the trial Court has rightly held that the prosecutrix was not a consenting party.

7. I have heard learned counsel for both the parties and have perused the material evidence available on record as also impugned judgment of the trial Court.

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8. First of all, I propose to consider the arguments advanced by learned counsel for the respective parties regarding age of the prosecutrix. The document of Ex.P/9 shows the date of birth of the prosecutrix as 1.7.1988. However, Mrs. Shanti Lakda (PW-6), who has proved the above document has categorically stated that the entry in the admission register was made on the basis of transfer certificate of Class-V and thus, the date of birth is based on the transfer certificate i.e. the entry made in the primary school at the time of admission of the prosecutrix but that evidence has not been adduced by the prosecution during trial. The father of the prosecutrix has categorically stated that at the time of admission the teacher recorded age of the prosecutrix on the basis of approximation. He has not stated that the entry was made by the teacher on the basis of information given by him and therefore, there is force in the argument of learned counsel for the appellant that the age cannot be assessed on the basis of admission register of Ex.P/9.

9. Now coming to the report of the radiologist. The report of the radiologist of Ex.P/11 mentions age of the prosecutrix to be 14 years. However, in the examination-in-chief the radiologist has stated that the prosecutrix could not be more than 16 years of age at the time of commission of the crime and in the cross-examination he has admitted that there may be a variation of 1-2 years in the age given by him in his report. The

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	law in this regard is settled that report of the radiologist is only approximate estimate of the age and there may be variation of 2-3 years in the age assessed by the radiologist owing to variations in climatic, dietetic, hereditary and other factors affecting the people of the different states of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphysis for the whole of India. Therefore, in the considered opinion of this Court the inference of the trial Court that the prosecutrix was less than 18 years at the time of incident was not proper. 10. The second question is whether the prosecutrix was a consenting party? After closely scrutinizing the statement of the prosecutrix, that of alleged eyewitness Sarju (PW-3) and also considering the statement of Dr. (Smt.) Kiran Bhujagwali (PW-11), who has stated that the prosecutrix had not sustained any injuries on her person including her private part, she was not complaining pain in her private part, there was an old rupture of hymen, the possibility of her being a consenting party cannot be ruled out. 11. In the result, the appeal is allowed. Impugned judgment of the trial Court convicting the appellant under Section 363, 366, 376 of IPC and imposing sentence thereon, are set aside. The appellant is acquitted of the above charges. He be set at liberty forthwith if not required in any other case. Sd/- Dhirendra Mishra Judge	

[पेज के अंत में